Neutral Citation Number: [2025] EWCA Civ 488

Case No: CA-2024-002003

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ JARMAN KC SITTING AS A JUDGE OF THE HIGH COURT
[2024] EWHC 2107 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 April 2025

Before:

LORD JUSTICE SINGH

and

LORD JUSTICE LEWIS

- -

Between:

THE KING **(on the application of Greenfields (IOW) Limited)**	**Appellant**
- and -	
(1) ISLE OF WIGHT COUNCIL **(2) WESTRIDGE VILLAGE LIMITED**	**Respondent**

- -
- -

Charles Streeten and Brendan Brett (instructed by direct access) for the **Appellant**
Ashley Bowes (instructed by the **Isle of Wight Council Legal Services**) for the **First Respondent.**
The Second Respondent did not appear and was not represented.

Hearing dates: 8 and 9 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE LEWIS:

INTRODUCTION

1. This appeal concerns the grant of planning permission for a development which included 473 new houses and other buildings, together with related infrastructure, in Ryde in the Isle of Wight. The appellant, Greenfields (IOW) Ltd., is a company limited by guarantee. Its shareholders are, or include, residents of the area who objected to the grant of planning permission.

2. The planning committee of the first respondent, the Isle of Wight Council ("the Council") resolved at a meeting on 27 July 2021 to grant planning permission for the development subject to securing an agreement under section 106 of the Town and Country Planning Act 1990 ("the 1990 Act"). One of the matters to be dealt with in the section 106 agreement was a financial contribution by the developer to the cost of highway works necessary to improve two road junctions, Westridge Cross and the junction between Smallbrook Lane and Great Preston Road. The planning application was considered again at a meeting on 25 April 2023 and the committee resolved, again, to grant planning permission.

3. The Council's officers negotiated a section 106 agreement with the developer. They did not place the proposed agreement, nor the final agreement, on the Council's planning register as required by article 40(3)(b) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 ("the Order"). The agreement provided for the developer to contribute a sum of £406,359 to the highway works. Planning permission was granted on 4 August 2023.

4. Greenfields applied for judicial review of the decision to grant planning permission. The matter came before HHJ Jarman KC ("the judge"), sitting in the High Court, by way of a rolled-up hearing, that is a hearing which dealt both with whether permission to apply for judicial review should be granted and the claim itself. There were five grounds of claim, only four of which are relevant to this appeal. The judge refused permission to apply for judicial review on two grounds. One was the failure to publish the section 106 agreement prior to the grant of planning permission, which was ground 3 of the claim. The second was the allegation that the planning committee had failed to consider material considerations, or were misled by officers in relation to certain matters, which was ground 5 of the claim. The judge refused permission pursuant to section 31(2C) of the Senior Courts Act 1981 ("the 1981 Act").

5. The judge granted permission on two other grounds but dismissed the claim on those grounds. The first concerned procedural irregularity in relation to the 27 July 2021 meeting as one councillor, Councillor Price, was excluded from the meeting as he had not attended the site visit in full. That formed part of ground 1 of the claim. The second was the allegation that the grant of planning permission was vitiated by apparent bias by the acting chairman of the planning committee, Councillor Brodie, which formed ground 2 of the claim.

6. The appellant has permission to appeal on four grounds:

(1) Ground 1, the judge was wrong to refuse permission on the ground that the grant of planning permission was unlawful because of the failure to publish the section 106 agreement (this was ground 3 of the claim);

(2) Ground 2, the judge was wrong to refuse permission on the ground that the Council failed to have regard to material considerations, or the officers failed to advise the planning committee of material considerations, at the April 2023 meeting. The material considerations are said to be, first, the fact that an outline planning permission for another development ("the Pennyfeathers development") had lapsed and, secondly, that there had been no progress since 2022 in relation to the review of highways improvement works (this was ground 5 of the claim);

(3) Ground 3, the judge was wrong to hold that the conduct of Councillor Brodie did not give rise to the appearance of bias (this was ground 2 of the claim); and

(4) Ground 4, the judge should have found that the procedural irregularity in relation to the exclusion of Councillor Price at the July 2021 meeting also vitiated the resolution passed at the April 2023 meeting (this was ground 1 of the claim).

7. By a respondent's notice, the Council contend that the order of the judge should be upheld on additional grounds, namely:

(1) the appellant was out of time to bring the claim on what are now grounds 3 and 4 of the appeal (a claim that the appellant was out of time in relation to ground 1 was abandoned at the hearing);

(2) permission to bring the claim on what are now grounds 1, 2 and 4 of the appeal should have been refused on the additional ground that the claim in respect of those matters was academic;

(3) in relation to ground 4, the judge erred in concluding that Councillor Price was improperly excluded from the meeting; and

(4) in relation to ground 2, the judge should have found that the Council was entitled to conclude that there was a realistic prospect of the Pennyfeathers development coming forward at a later date. The appellant contends that the Council should not be allowed to raise this point.

THE FACTS

The application for planning permission

8. The material facts for the purpose of this appeal are as follows. The interested party, Westridge Village Ltd., applied for planning permission for the proposed development in 2019. The proposed development was controversial. One of the points of controversy concerned the impact of the proposed development, and other developments, on the highways network and how the costs of any works mitigating that impact would be funded.

The officers' reports

9. The planning committee was due to consider the application at its meeting on 27 July 2021. A report was prepared by officers which ran to almost 80 pages. It dealt, amongst other things, with highways. The report dealt specifically with the capacity of highways and traffic impact at paragraphs 6.147 to 6.152. Paragraph 6.147 said this:

> "6.147 As detailed within paragraph 1.24 of the Transport Assessment various junction capacity assessments have been undertaken and these indicate that periods of congestion may occur during peak periods as a result of traffic flows attributable to the development. As part of the initial comments returned by Island Roads a request was made seeking further justification as to how the applicant had derived the proposed trigger points for offsite highway improvements at the Westridge Cross and the Great Preston Road/Smallbrook Lane junctions."

10. The report continued by noting the further data that had been provided. It referred to comments by Island Roads, who were then recommending a refusal because of capacity issues associated with the two junctions. The report noted that it was accepted that there may be scope for improvement works at each of the two junctions but that relied on land owned by a third party being provided.

11. The report then considered further comments from Island Roads. It considered the planning permission which had been granted to another development, the Nicholson development. At paragraph 6.150, the report noted that there were a number of housing developments for which planning permission had been granted or sought which would have an impact on junctions within eastern Ryde. The report noted the Council as a planning authority and a highway authority had commissioned consultants to undertake a review of improvement schemes to junctions affected by future development. The report concluded this section with the following:

> "**6.151** The aim is therefore for the Council to adopt suitable junction designs and then lead on the delivery of coherent and holistic junction improvement schemes at an appropriate time. These works would be funded by s.106 monies that have already been collected and future contributions/direct works from nearby proposed developments. The Highway Authority has confirmed that the review is scheduled to be completed in August 2021. The outcome of the review would allow the Council to select suitable junction designs that would mitigate the impacts of new developments.
>
> **6.152** As the above approach has been taken in the determination of other applications in the vicinity of the site, it would be unreasonable to take a different approach in respect of this application. It is therefore recommended that a contribution is sought in respect of these wider network

> improvements, for the Council to implement these works, when required.

12. The recommendation of the officers, so far as material to this appeal, was:

> **"8 Recommendation**
>
> **8.1.** Conditional permission subject to a Section 106 Agreement covering the following Heads of Terms:
>
> "Financial contribution towards the provision of highway works to improve the Westridge Cross and the junction between Smallbrook Lane and Great Preston Road
>
> ….."

13. An update was provided by officers on 27 July 2021 to summarise certain policy developments and further representations. These included one representation on behalf of the applicants for planning permission for the Pennyfeathers development. The update summarised the concerns raised, namely that a background paper had not been made available, that the consent of third parties would be needed to enable the proposed development to proceed, and that there should be a clear scheme for highways improvements before contributions were collected. The update provided the officers' response to those concerns. In relation to transport, it noted that the documents provided for the application for planning permission included plans showing detailed improvements of the two key junctions. It noted that the section 106 agreement proposed would "set out the overall cost the development would need to contribute". It noted that the applicant had made its own assessment of costs, which was that costs would "be in the region of £777,000 (both junctions)".

Events before the meeting

14. Two events took place before the meeting that are material to the grounds of appeal. First, on 26 July 2021, Councillor Brodie, who was then the vice-chair of the planning committee and would be chairing the planning committee meeting the next day, wrote to Councillor Price. He said that he would not permit Councillor Price to participate in the consideration of the application as Councillor Price had not attended all of the site visit the previous Friday and there was much that he missed.

15. Secondly, Councillor Churchman asked to be allowed to attend and speak at the planning committee. She was a councillor, but was not a member of the planning committee and the proposed development was not in her ward. In those circumstances, the Council's code of practice indicates that a councillor may be allowed to speak if he or she has a contribution which relates to material planning considerations which it has not been practicable to make in writing via planning officers and no other member of the planning committee could or would make that contribution.

16. Councillor Brodie says in his witness statement that Councillor Churchman asked if she could attend, and he says he sought to clarify what her contribution would be. He says that Councillor Churchman indicated that she would be speaking against the item

but she failed to identify any material considerations which would not otherwise be put to the committee. He therefore declined to invite her to attend.

17. Councillor Churchman says in her witness statement that she asked for permission to speak and Councillor Brodie refused as the proposed development was not in her ward. She says she asked again and she says that he said no unless she could support the application. The closest to contemporaneous evidence is a screenshot of a message sent by Councillor Churchman to another councillor in which she says had asked twice and been refused permission to speak at the meeting. She said that Councillor Brodie had said no unless she could support the application and, she says, he added there were plenty of people to speak against it and he did not need her as well.

The meeting of 21 July 2021

18. The events at the meeting are described in detail at paragraphs 19 to 31 of the judgment below. It is necessary to note only the following. A number of members attended but some did not as they had been advised that they might be seen to have pre-determined the application. Councillor Price did not attend in light of the decision of Councillor Brodie.

19. After discussion, one member proposed accepting the recommendation to grant conditional permission. That was seconded and voted upon. Four members voted against the motion and three voted in favour, so that the motion was not passed. A proposal was made and seconded to refuse the application for planning permission. There were discussions as to what planning reasons could be put forward justifying a refusal. The motion to refuse the recommendation was voted upon. Four members voted for the motion, four voted against and Councillor Brodie, acting as chair, had a casting vote and cast that vote against the motion. The motion to refuse the application was not passed. A third motion was put, to accept the recommendation (with a minor alteration to the amount of affordable rented housing). That motion was carried by four votes in favour, two against, and with two members abstaining. The Council therefore resolved to accept the recommendation to grant conditional planning permission subject to securing a section 106 agreement dealing with the heads of terms included in the report.

Events after the meeting

20. The events occurring after the meeting are set out in paragraphs 32 to 41 of the judgment below. It is necessary to note only the following. First, a meeting of the planning committee was held on 29 March 2022. A report to that meeting indicated that officers were ready to issue the planning permission in accordance with the resolution of 21 July 2021, subject to obtaining signatures to the section 106 agreement. A motion was put that the head of planning should refrain from granting planning permission. Six voted against and four voted in favour.

21. Secondly, on 21 April 2023, an application for reserved matters for the Pennyfeathers development was refused. The outline planning permission for the development expired. That permission had also been conditional on securing financial contributions to improvements to the highways.

The meeting on 25 April 2023

22. By April 2023, planning permission had still not been issued. There had been further representations from Natural England asking that amendments be made to the heads of terms for the section 106 agreement to include enhanced mitigation measures to protect curlews. There had also been two representations about the provision of a GP surgery.

23. A meeting was held on 25 April 2023. Twelve councillors attended the meeting including Councillor Price. One declared an interest and left the room and took no part in the meeting. An e-mail had been sent to councillors by a senior planning officer advising them that, in the opinion of officers, all material matters (other than that relating to curlews and one other point not material to this appeal) remained unchanged. It advised councillors that its previous resolution of 21 July 2021 to grant planning permission would be a material consideration for councillors when considering how to proceed. A report was prepared by planning officers summarising the representations received. It annexed the earlier officers' reports. It recommended the grant of conditional planning permission subject to securing a section 106 agreement.

24. A motion was put to reject the application for planning permission on the basis that mitigation measures were not satisfactory. Five members voted in favour and six (including Councillors Brodie and Price) voted against. A motion was put to approve the application for planning permission. That was carried by six votes to five (Councillors Brodie and Price were among the six who voted in favour). The minutes of the meeting record:

> "RESOLVED
>
> THAT the application … be approved subject to the additional 71% of 35% affordable housing being affordable rent and the curlew habitat being provided prior to the development past the area currently shown as phase A on the relevant drawing number."

Events after the meeting of 25 April 2023

25. The section 106 agreement was duly agreed and signed. It provided for a contribution by the developer to highways development in the sum of £406,359. At no time did the Council place a copy of a proposed or final section 106 agreement on the planning register prior to issuing planning permission.

26. Planning permission was issued on 4 August 2023. It was expressed to be pursuant to the decision made on 25 April 2023.

The claim for judicial review

27. The appellant brought a claim for judicial review of what was described in the claim form as the "Council's decision to grant planning permission on 4 August 2023" for the development. There were five grounds of claim, only four of which are material to the appeal. I say nothing about the fifth.

28. There was a witness statement made by Sarah Wilkinson filed on behalf of the Council. Ms Wilkinson is employed as a planning development manager. Ms Wilkinson was the case officer responsible for considering the application for planning permission and wrote the reports. Her witness statement is not always easy to understand. Some paragraphs appear to be describing the process by which the application was considered and the reports written. Paragraph 9 says this:

> "9. The Council commissioned Island Roads to produce a report identifying the detailed design required to Ryde junctions, identified within the supporting documents for the Island Planning Strategy, which would be required to create sufficient capacity from the developments in the vicinity and the costs associated with these works. The costs associated with the junction of Smallbrook with Great Preston and Westridge Cross were then divided to create a per unit cost which could then be split between the developments. These two junctions were those that would be impacted by all developments."

29. Ms Wilkinson does not identify the developments to which she is referring. She does not provide details of the costs referred to. Nor does Ms Wilkinson say when this work was carried out. In paragraph 10, she refers to details of the works and costing being presented to the Ryde Transport Projects Board, but the details are not included in the evidence before this Court. There is a document which appears to be a notice dated 26 February 2020 concerning an instruction to prepare detailed design and implementation of a package of junction improvements and the junctions are listed. Some developments are referred to in that note.

30. At paragraphs 12 and 13, Ms Wilkinson appears to describe the process by which the financial contribution for the two junctions was determined and included in the section 106 agreement (and counsel for the Council confirmed that that understanding was correct). Those paragraphs say this:

> "12. It was considered that pooling contributions from the proposed development would allow for a single scheme to be pursued rather than multiple individual ones. I therefore established the per unit cost associated with the likely traffic generation from each development and split this between the schemes, based on the indicative cost of the works. It was considered that the works could be done in a phased manner depending on the number of units being delivered, in respect of when the impact would be felt on the network and where. Each contribution would be index linked to allow for increases in cost over the time period of the implementation.
>
> 13. The contribution was therefore taken based on a scheme of proposed works and relevant costings for these works. The contribution was therefore considered to be proportionate, necessary and fairly and reasonably related to the scale and kind of the development."

31. There is no information provided by Ms Wilkinson as to the costs involved, the developments involved, or the amount of costs to be borne by particular developments.

32. A witness statement was also made by David Long on behalf of the interested party who were the applicants for planning permission. This witness statement was before the court below but was not included in the bundles for this appeal. Since it was mentioned at the hearing, and was potentially important, the Court granted the Council permission to file it late, without objection from the appellant. At paragraph 7, Mr Long says that the Council calculated the figure of £406,359 in the section 106 agreement by developing costs for the two junctions, amounting to £530,124.38 for Great Preston Road/Smallbrook Lane and £772,087.56 for Westridge Cross. These costs (minus a contribution already received from a development at another site, Hope Road) were divided by the number of new dwellings at each of the developments. That gave a figure of £489 for each dwelling. That figure was multiplied by the number of new dwellings at the proposed development (which is given as 831) to give a figure of £406,359.

33. A three page e-mail dated 11 February 2022 sent by a senior planning officer is exhibited to Mr Long's witness statement (this e-mail had been included in the bundles for this appeal). That, we were told, contains the details of the calculations. It lists four developments, Nicholson Road, Pennyfeathers, Westacre and RST and gives the number of new homes proposed or permitted at each. The cost of the highways works is said to be £1,359,000 (which, I note is slightly higher than the figure given in the witness statement). It divides that amount by the number of homes for each of the four developments and gives figures for each development's contribution and the share of the overall cost as:

    Nicholson Road 616 x 489 = £301,224 (22.41%)

    Pennyfeathers 1195 x 489 = £584,355 (42.95%)

    Westacre 831 x 489 = £406, 359 (20.97%)

    RST 140 x 489 = £68,406 (5%)

The judgment

34. The judge dealt first with the question of whether the claim was brought out of time in relation to what are now grounds 1, 3 and 4 of the appeal (grounds 1,2 and 3 of the original claim). The conduct complained of dated back as far as July 2021 as it concerned the exclusion of Councillor Price from the 27 July 2021 meeting, the allegation that Councillor Brodie's conduct at that time gave rise to an appearance of bias which vitiated the resolution to grant planning permission and the failure to place a draft or finalised section 106 agreement on the website. It was said that any claim in relation to those grounds of challenge had to be brought within 6 weeks of the date when the grounds first arose.

35. The judge set out the decision of the House of Lords in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2022] 1 WLR 1593 and subsequent case law. He considered that the decision in *Burkettt* established that the

date when the grounds of challenge first arose was the date when planning permission was granted, not the date of the resolution of the relevant committee to grant planning permission. He recorded the submission of Dr Bowes for the Council that *Burkett* was distinguishable as the planning permission here was granted pursuant to the April 2023 resolution and was not contingent on the July 2021 resolution and that Greenfields was out of time to challenge conduct relating to the July 2021 resolution. The judge concluded:

> "59. In my judgment the resolution of July 2021 was a decision which was preliminary to the grant of permission. It was not a distinct step in a multi stage process. In *Burkett* there were two preconditions to the grant, whereas here there was only one, but like *Burkett* the grant was conditional upon the signing of the section 106 agreement. The reason the officers did not issue the grant under delegated authority, which they could have done, was that it had been a difficult application to manage and they did not think it appropriate to do so. Instead, they asked the committee to reconsider. Then Natural England raised issues about curlew habitat mitigation land which the full committee did consider and which led to the resolution which authorised the grant. The July 21 resolution was considered by officers to be a material consideration in that grant. In my judgment, this challenge has been brought within time and properly includes within its compass the criticisms of procedural and other irregularities in respect of the July 2021 meeting. Whether subsequent events renders any such criticisms academic is another matter and will be dealt after the grounds have been considered in substance. "

36. The judge then considered the grounds of claim. For convenience, I will consider them in the order in which they now appear in the grounds of appeal. In relation to ground 1 of the appeal (ground 3 of the claim), the failure to publish the section 106 agreement, the judge said this:

> 73. It is not in dispute that the authority was in breach of the statutory duty in article 40(3)(b) DMPO by not publishing the section 106 agreement, in draft or final form, until August 2023 after Greenfields referred to the breach in its pre-action letter.

37. He considered decisions in *Midcounties Cooperative v Wyre District Forest* [2009] EWHC 964 (Admin)*, R (Davies) v Oxford City Council* [2023] EWHC 1737 (Admin) and *R (Worcestershire Acute Hospitals Trust v Malvern Hills District Council and others* [2023] EWHC 1995 (Admin) 2023. He concluded at paragraph 78 that:

> "78. Greenfields has not shown that a copy of the section 106 agreement was requested on its behalf prior to the grant of planning permission or that it would have said anything on the detail of the section 106 agreement other than in terms of highway impact mitigation. I deal with this point under ground

> 5. As in *Davies* the heads of terms in the present case were set out in the officer's report which was put on the website."

38. He considered highways impact later, concluding that the planning committee had not failed to have regard to any relevant considerations or been misled by the officers' report. In the light of those findings, he refused permission to apply for judicial review on this ground pursuant to section 31(3C) of the 1981 Act as he was satisfied that it was highly likely that the outcome would not have been substantially different if the conduct complained of (the failure to publish the section 106 agreement) had not occurred.

39. In relation to what is now ground 2 of the appeal (ground 5 of the claim), failure to have regard to material considerations, the judge summarised the contentions at paragraph 79 and 81 to 82 of his judgment in the following terms:

> "79. Greenfields took this ground next and so do I. In the officer's report for the July 2021 meeting, it was stated that there would be adverse impacts from the development on two highway junctions, but that mitigation measures could be undertaken and that the developer would make a financial contribution towards coherent and holistic junction improvement schemes which would be the result of a review of junction improvement options for the area and which would be the subject of a report in August 2021. It was said that this review would allow the authority to select suitable junction designs that would mitigate the impacts of new developments in the area.
>
> …..
>
> 81. Greenfields says that no such review has taken place and accordingly the officers report was materially misleading and the committee took into account an immaterial consideration. To the extent that it relied on the financial contribution towards highways improvements without there being any suitable junction designs that would mitigate the impacts of new developments in the area it acted irrationally or inexplicably.
>
> 82. It also says that members were not told of the lapse of permission on the Pennyfeathers site, which was envisaged also to make contributions to highway impact mitigation."

40. The judge concluded that:

> "85. Officers were given delegated authority to carry forward schemes for highway impact mitigation. A formal review is not the only way that this could be done but in any event the approach which the officers took in calculating the amount of highway contribution was based upon costings of schemes of potential highways improvements.

> 86. Westridge points out that its transport assessment dealt with many different scenarios including whether or not any impact mitigation would be necessary with or without the Pennyfeathers development. In the event that that did not come forward, meaning that some mitigation and land acquisition may not be needed, the assessment concluded that junction 4 would operate with spare capacity.
>
> 87. I am not satisfied that in these respects members were misled or took into account immaterial considerations or acted irrationally."

41. The judge therefore refused permission to argue this ground, again relying on section 31(3C) of the 1981 Act.

42. Ground 3 of the appeal (ground 2 of the claim) is the allegation that an appearance of bias arose from Councillor Brodie's conduct which vitiated the resolution to grant planning permission. The judge set out the relevant case law and the test at paragraph 68 of his judgment. He noted at paragraph 69 that the classic basis for a finding of apparent bias was where a decision-maker had a personal or pecuniary interest and noted that that was not what was alleged here. "Instead what is relied upon is what occurred in the run up and during the July 2021 meeting". He dealt with the principal allegations and found that there was no basis to conclude that the conduct gave rise to an appearance of bias. In relation to the allegations relating to Councillor Churchman, the judge said this:

> "72. Other criticisms were made of Cllr Brodie under his ground, including his refusal to allow Cllr Churchman to attend the meeting, his subsequent forceful criticisms of Cllr Lilley, his failed attempt to exclude Cllr Adams from a subsequent meeting, and what is said to be his reluctance to give disclosure of texts and emails in these proceedings. Whatever view is taken of this conduct, in my judgment it does not support a finding of apparent bias or that he proceeded for an improper purpose."

43. The judge granted permission to apply for judicial review on this ground. In light of the fact that the ground was not made out, he dismissed this ground of claim.

44. Finally, in relation to ground 4 of the appeal (ground 1 of the claim), the exclusion of Councillor Price from the 21 July 2021 meeting, the judge found that the decision of Councillor Brodie that Councillor Price should not attend the meeting amounted to a procedural irregularity. The judge granted permission to appeal on that ground but dismissed this ground of claim as the matter was academic in the light of subsequent events.

THE APPEAL AND THE RESPONDENT'S NOTICE

45. I have summarised above the grounds of appeal and the points raised in the respondent's notice. It is sensible to deal with the issues in the following order. First, I deal with the question of whether Greenfields was out of time to apply for judicial

review in relation to what is now grounds 3 and 4 of the appeal. I then deal in turn with each of the four grounds of appeal. I then deal with the remainder of the issues raised in the respondent's notice so far as it is necessary to do so.

THE FIRST ISSUE – DELAY

Submissions

46. Dr Bowes for the Council accepted that the decision in *Burkett* provides that the six-week period within which a claim for judicial review in a planning matter must be brought runs from the date when planning permission is granted, not from the date when the relevant committee resolve to grant planning permission. He submitted that *Burkett* was distinguishable as, in this case, an earlier resolution to grant planning permission (here the 27 July 2021 resolution) had been superseded by a later resolution (here the 25 April 2023 resolution). Planning permission had been granted on the basis of that later resolution and was not contingent on the earlier resolution. In those circumstances, he submitted, a claim for judicial review related to conduct said to invalidate the earlier resolution had to be brought within six weeks of the earlier resolution. Dr Bowes relied upon dicta of Lord Briggs and Lord Sales in *R (Fylde Coast Farms Ltd v Fylde Borough Council* [2021] UKSC 18, [2021] 1 WLR 2794 at paragraph 36.

47. Mr Streeten, with Mr Brett, for Greenfields, submitted that where conduct by a local planning authority continues to play a material part up to the grant of planning permission, the lawfulness of that conduct may be challenged if the claim is brought within six weeks of the grant of permission. Here, the resolution of 27 July 2021 did continue to play a material part in the grant of planning permission. Councillors were advised that the resolution was a material consideration to take into account when deciding how to proceed at the meeting in April 2023.

Discussion

48. CPR 54.5 provides that where a claim for judicial review relates to a decision made by a planning authority under the planning acts (which is the position here), the claim form must be filed not later than six weeks after the grounds to make the claim first arose. The operation of the predecessor rule in RSC Ord 53, which was in material similar terms save that the time limit was three months not six weeks, was considered by the House of Lords in *Burkett*. There, the relevant committee of a local planning authority resolved on 15 September 1999 to grant planning permission subject to conditions (1) completion of a satisfactory section 106 agreement and (2) there being no contrary direction by the Secretary of State (this second condition was satisfied on 24 February 2000). On 6 April 2000, the claimants submitted a claim for judicial review. That was more than three months after the resolution to grant planning permission. However, the second condition, entering into a section 106 agreement, was not satisfied until 12 May 2000 and planning permission was granted on that day. The House decided that, in that case, the words "from the date when the grounds for the application first arose" referred to the date when the planning permission was granted. Consequently, time did not begin to run from the date of the resolution in September 1999 but only from the grant of planning permission on 12 May 2000. The claim was, therefore, brought within time.

49. The decision in *Fylde* concerned the statutory provisions governing the making of neighbourhood development orders or plans. There were a series of steps that had to be taken before such an order or plan could be made. They involved broadly (1) designation of a neighbourhood area (2) preparation and consultation (3) submission of a proposal (4) consideration of the proposal by an independent examiner (5) consideration of the examiner's report (6) holding a local referendum and (7) making the order or plan. The relevant statutory provision provided for the time limits for bringing a claim in relation to steps 5, 6 and 7 to begin to run from the date when that step was taken (see paragraphs 2 to 3). It was in that context that Lord Briggs and Lord Sales observed at paragraph 36 under the heading "Challenging muti-step administrative action" that:

> "36. The act of a public authority is taken to be valid and effective unless it is challenged and quashed by legal action taken in proper time. However, where a public law measure is taken at the end of and on the basis of a series of steps and its lawfulness is contingent on the lawfulness of each of the steps leading up to it, a question may arise whether the lawfulness of the final measure (in this case, the making of the neighbourhood development plan) can be impugned by a claim brought within time assessed by reference to that measure by showing that an earlier step was affected by unlawfulness, even though the claimant would by then be out of time to challenge the lawfulness of the earlier step if taken by itself".

50. Lord Briggs and Lord Sales noted the position in relation to the grant of planning permission as established in *Burkett* (whilst noting that that approach might need to be revisited by the Supreme Court: see paragraph 40).

51. In the present case, the question is whether it is possible to distinguish the present case from *Burkett*. In particular, the question is whether it is possible to regard the earlier July 2021 resolution as being in some ways a distinct step in the process, separate from the later April 2023 resolution, and where the grant of planning permission was not contingent upon that earlier July 2021 resolution. In my view, if there is a material connection between the earlier July 2021 resolution and the ultimate grant of planning permission, then it would not be possible to regard the July 2021 resolution as a distinct step. In those circumstances, the position in *Burkett* would apply and the time for bringing a claim for judicial review would run from the date when planning permission was granted (here 4 August 2023).

52. In the present case, the judge found at paragraph 40 that there was a link between the earlier resolution and the decision to grant planning permission. As a minimum, the members of the committee had been advised by officers that all matters (save one which is not relevant) were unchanged and the earlier resolution was a material consideration for the planning committee to consider at its meeting on 25 April 2023 when deciding how to proceed: see paragraph 40 of the judgment below. That is why the judge concluded at paragraph 59 that "the resolution of July 2021 was a decision which was preliminary to the grant of permission. It was not a distinct step in a multi stage process.". The judge was entitled, indeed in my judgment he was correct, to take that view. The reality is that the process leading up to the grant of planning permission began with the resolution of 27 July 2021. Given the delay and the new

issue relating to curlews, the matter went back to the planning committee in April 2023. Nothing had changed substantively since the earlier resolution, and that resolution remained material. When the planning committee resolved on 25 April 2023 to approve the application, it was in truth an affirmation of the earlier resolution to grant planning permission subject to a satisfactory section 106 agreement being concluded. The judge was correct, therefore, to conclude that the claim so far as it related to conduct at, or connected with, the meeting on 27 July 2021 was brought within time as the claim for judicial review was brought within six weeks of the grant on 4 August 2023 of planning permission.

THE SECOND ISSUE – GROUND 1 AND THE FAILURE TO PLACE THE SECTION 106 AGREEMENT ON THE PLANNING REGISTER

53. Mr Streeten submitted that there had been a breach of Article 40(3) of the Order as the proposed or final section 106 agreement was not placed on the Council's planning register. He submitted that the first question was whether that rendered the decision to grant planning permission invalid. That was to be approached applying the approach in *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340, and *A1 Properties Ltd v Tudor Studios RTM Co Ltd* [2024] UKSC 27, [2024] 3 WLR 601. That involved considering whether the intention was that failure to comply would result in the invalidity of the subsequent decision. Here, the purpose of Article 40(3) was to require the publication, with a view to members of the public having an opportunity to comment upon, a proposed section 106 agreement or one that had been entered but where planning permission had not yet been granted. There had been no substantial compliance as the terms of the section 106 agreement were never publicised and the amount of the contribution that the developer would make to highways improvements was not known until after the grant of planning permission. There was substantial prejudice. It was accepted that shareholders in Greenfields were checking the planning register to see if a draft was available. Further, Mr Streeten identified three specific occasions when a copy of the section 106 agreement was requested. There were things that Greenfields would have said in relation to the amount of the financial contribution, as appeared from the witness statement of Mr Philip Jordan. That concerned the amount of the contribution, whether it would be sufficient to bring about the required highway improvements and the effect of the outline planning permission for the Pennyfeathers development lapsing and that development not proceeding.

54. Dr Bowes accepted that the correct approach was that set out *Soneji*. He submitted that there had been substantial compliance here as the heads of terms set out in the officers' report were publicised on the website. Further, there was no prejudice. He accepted that shareholders had checked the planning register but there had been no specific request by Greenfields for a copy of the planning agreement. There had been no prejudice as, properly understood, the amount of the contribution to be paid by the developer of £406,359, together with the contribution from two developments – Nicholson Road, and RTS – would yield the £770,000 that the developer said was required. Therefore, the failure to comply with Article 40 did not render the grant of planning permission invalid. Alternatively, the court could be satisfied that it was highly likely that the outcome would not be substantially different if the conduct complained of (the failure to publish the agreement) had not occurred as planning permission would have been granted as the cost of the highway improvements was

secured by the section 106 agreement. He relied upon the decision in *Midcounties* and *Davies*.

Discussion

55. The first question is whether the failure to comply with Article 40(3) of the Order results in the invalidity of the grant of planning permission. If so, the second question that may arise is whether a remedy should be refused pursuant to section 31(2A) of the 1981 Act or as a matter of discretion on the part of the court. The two questions are analytically distinct and should be considered separately.

The consequences of failure to comply with the Order

56. Article 40(3) of the Order provides so far as material that:

> "(1) In this article and in articles 41 and 42, "the local planning register authority" means—
>
> …..
>
> (c) in relation to any other land—
>
> (i) the district planning authority; or
>
> (ii) where there is no district planning authority in relation to the land, the county planning authority,
>
> (and references to the area of the local planning register authority are, in this case, to the area of the district planning authority or the area of the county planning authority, as the case may be, other than any part of their area within a National Park).
>
> (2) Each local planning register authority must keep, in two parts, a register ("the register") of every application for planning permission relating to their area.
>
> (3) Part 1 of the register must contain in respect of each such application and any application for approval of reserved matters made in respect of an outline planning permission granted on such an application, made or sent to the local planning register authority and not finally disposed of—
>
> (a) a copy (which may be photographic or in electronic form) of the application together with any accompanying plans and drawings;
>
> (b) a copy (which may be photographic or in electronic form) of any planning obligation or section 278 agreement proposed or entered into in connection with the application;

> (c) a copy (which may be photographic or in electronic form) of any other planning obligation or section 278 agreement entered into in respect of the land the subject of the application which the applicant considers relevant; and
>
> (d) particulars of any modification to any planning obligation or section 278 agreement included in Part 1 of the register in accordance with sub-paragraphs (b) and (c).

57. A planning obligation is an obligation of the kind described in section 106 of the 1990 Act which includes obligations requiring a sum of money to be paid to an authority. Section 278 deals with highways agreements.

58. The purpose of article 40(3)(b) of the Order appears from its wording and statutory context. Certain documents must be placed on the planning register in the period before an application for planning permission is finally disposed of. They include a copy of a planning obligation (or a highways agreement) which it is proposed to enter into or which has been entered into. The purpose of publication is to enable members of the public to know the terms of a proposed or agreed planning obligation, and to enable them to comment on the proposed or agreed planning obligation if they choose to do so. The article envisages that members of the public may comment on the subject matter of the planning obligation. Publication of the section 106 agreement is not intended to provide an opportunity to make comments on wider issues to do with the desirability or otherwise of the grant of planning permission. Those matters will have been dealt with by the planning committee which resolved to grant the planning permission.

59. I do not accept the submission made in the appellant's skeleton argument that the obligation in article 40(3(b) is properly to be regarded as a statutory obligation to consult. That is not the nature of the duty imposed by the Order. It is a duty to include certain information on a publicly available planning register. Nor do I regard the observations of Ouseley J. in *Midcounties* to have decided that the obligation amounted to a duty to consult. On a proper analysis of his judgment, Ouseley J. was concerned with the scope of legitimate expectations arising from the then applicable planning circular (now replaced with planning guidance expressed in different terms) and correspondence from the local authority, not with the purpose of the statutory duty itself. Ouseley J. also dealt with the question of when a proposed section 106 obligation had to be published. That issue does not arise for decision in this case as a proposed or agreed section 106 planning was never placed on the Council's planning register prior to the final disposal of the application by the grant of planning permission on 4 August 2023.

60. It is accepted here that the Council did not comply with its obligation under article 40(3)(b) and did not place a copy of the proposed section 106 agreement on the planning register, nor the final agreement, before it granted planning permission on 4 August 2023.

61. The first issue is whether the failure to comply with the statutory obligation had the consequence that the decision of 4 August 2023 to issue the planning permission was invalid. The correct approach to that question is now set out in the decisions of the House of Lords in *Soneji* and the Supreme Court in *A1 Properties.* The correct

question is identified by Lord Steyn in *Soneji* (with whose approach the other members of the House agreed) at paragraph 23:

> "the emphasis is on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity".

62. That approach is confirmed by the Supreme Court in *AI Properties*. As Lord Briggs and Lords Sales, with whose judgment the other members of the court agreed, held:

> "61. The point of adoption of the revised analytical framework in *Soneji* was to move away from a rigid category-based approach to evaluating the consequences of a failure to comply with a statutory procedural requirement and to focus instead on (a) the purpose served by the requirement as assessed in light of a detailed analysis of the particular statute and (b) the specific facts of the case, having regard to whether any (and what) prejudice might be caused or whether any injustice might arise if the validity of the statutory process is affirmed notwithstanding the breach of the procedural requirement….
>
> 62. This does not mean that application of procedural rules in every statutory context turns on detailed examination of the consequences arising from the particular facts of the case, nor that a test of substantial compliance is properly to be applied in relation to every procedural rule. Examination of the purpose served by a particular statutory procedural rule may indicate that Parliament intended that it should operate strictly, as a bright line rule, so that any failure to comply with it invalidates the procedure which follows. An example would be the notice requirements for extending business tenancies under the Landlord and Tenant Act 1954 , where failure to serve a notice in proper time means that the tenant loses their right to extend. The procedural rules there apply in a context where there is an established bilateral relationship between landlord and tenant, where the tenant is in a position to know clearly what it has to do and where both parties need to know clearly what property rights they have and may dispose of in the market.
>
> 63. Often, however, analysis according to the *Soneji* approach does not lead to such a clear-cut result. The statutory regime may reflect, and balance, a number of intersecting purposes, both as to substantive outcomes and as to the procedural protections inherent in the regime. In that situation, a more nuanced analysis may be called for. *Soneji* itself is an example of this. The purpose of depriving convicted offenders of the proceeds of their crimes had to be balanced against sufficient compliance with procedural protections available to them before they could be deprived of their property. A test of substantial compliance with a procedural rule may be an appropriate way to allow for such a balance to be struck

> between competing purposes. If there has been substantial compliance with the rule, so that the purpose served by it has largely (if not completely) been fulfilled, it may more readily be concluded that fulfilment of the competing substantive purpose of the legislation should be given priority. But we would observe that reference to "substantial compliance" begs the question of what purpose was supposed to be served by the rule and expresses a conclusion arising from the relevant analysis, rather than stating a test in itself. Statutory regimes involving procedural obligations are many and are highly varied, and there is no simple shortcut which avoids the need to undertake the analysis referred to in *Soneji* having regard to the particular provisions, scheme and purposes served by the statute in question."

63. This is not a case where the intention underlying article 40(3) of the Order was that any failure to comply would result in the invalidity of a decision taken following such a failure. A breach of article 40(3) could occur in a wide range of factual circumstances, from situations where the content of a proposed section 106 agreement was not known to situations where, even though the agreement was not placed on the planning register, the content may in fact be in the public domain. The impact of the failure on the ability of members of the public to comment on the subject matter of a proposed section 106 agreement will, likewise, vary depending on the facts of a particular case. In those circumstances, I do not consider that the intention, or the purpose, underlying article 40(3) requires that any failure to comply renders a subsequent decision invalid. It is necessary to evaluate the consequences of non-compliance on the facts of the case.

64. First, there was little or no compliance with the purpose underlying article 40(3) in the present case. The material part of the proposed section 106 agreement was to fix the financial contribution to be paid by the developer for the highway works needed to improve two particular junctions. The Council's failure to comply with its obligations meant that the amount of the financial contribution fixed in the section 106 agreement was not publicised, and not known, before the planning permission was issued on 4 August 2023.

65. I do not accept the submission of Dr Bowes that there was substantial compliance because the officer's report referred to the heads of terms and that was sufficient. The heads of terms would only inform the reader that a financial contribution towards the relevant highway works would need to be agreed. It does not tell the reader what that contribution is. The case is materially different from *Davies* where the heads of terms, which were available on the planning register, specifically set out the amount of the contributions required for specific works and the section 106 agreement reflected that. There was, therefore, compliance in substance, if not in form, with the requirement to publish the section 106 agreement: see paragraphs 19 and 131 to 132 of the judgment of Julian Knowles J.

66. Secondly, the consequences of non-compliance was to deprive the appellant of the opportunity to comment upon the contribution. The significance of that can be assessed by considering whether there was anything that the appellant might have wished to say on the proposed or final section 106 agreement, and whether it would

have wished to comment. On the first issue, it is obvious that the appellant, on the facts, of this case, might well have wanted to comment on the amount of the financial contribution. The contribution was £406,359. It was intended to fund the highway improvements necessary at the two junctions. The officers' update to the planning committee of 27 July 2021 had said that the developer's own estimate of the costs of the work was in the region of £777,000 (in 2021). It is obvious that comment might well have been made on why a proposed section 106 agreement provided for a financial contribution which appeared to be well short of the amount required to do the highways works rendered necessary by the grant of planning permission. Dr Bowes sought to demonstrate that, ultimately, the amount of the contribution was explicable and would be adequate. That, however, is a matter relevant to the issue of remedies rather than whether the failure to comply rendered the decision of 4 August 2023 unlawful. I deal with that below.

67. On the issue of whether Greenfields would have commented on the section 106 agreement, the overwhelming likelihood is that it would have. Its shareholders were, or included, residents in the area who were deeply interested in, and concerned by, the proposed development. It is agreed that shareholders were checking the Council's website to see if a proposed section 106 had been placed on the planning register. That, of course, is where a member of the public would expect to find the agreement, given the obligation on the Council to place a proposed section 106 agreement on the planning register. Further, the minutes of a meeting on 27 April 2023 of the board of directors records a number of matters said to be of paramount importance to Greenfields including the costings for the highway works and details of how the section 106 contribution had been arrived at. If the Council had published a proposed section 106 agreement fixing a contribution of £406,359, the overwhelming likelihood is that Greenfields would have commented on that matter before planning permission was granted on 4 August 2023.

68. I do not accept the submission of Mr Streeten that, on the evidence, there were three specific occasions when a copy of the agreement was requested on behalf of Greenfields. The first was a letter from Greenfields' then solicitors sent in March 2022 prior to a meeting of the planning committee which was to consider whether or not to reconsider the earlier resolution to grant planning permission. The letter (which is lengthy) reminded the Council of its obligations but did not ask for a copy of any proposed agreement. The second comprises minutes of a meeting of Greenfields' board of directors on 27 April 2023 which records that residents had sent e-mails to the Council on a variety of matters including the section 106 agreement. The e-mails are not exhibited in the evidence. This falls far short of evidence that Greenfields requested a copy of the agreement. Thirdly there is an e-mail of 7 July 2023 to the support manager of the Council's chief executive. The context is that the sender of the e-mail had been complaining about the inaccuracy of Council minutes. In the final exchange, the writer asked if the support manager would "let me know when the decision-notice has been issued and can you also send me a copy of the developer's road contribution agreement as approved by Island Roads". I do not read that as a request for a section 106 agreement with a view to comment on it prior to the planning permission being issued. It is a request to be provided with notice of the final grant of planning permission and the approved agreement.

69. The fact that a person has not requested a copy of the section 106 agreement may, depending on the facts, be a factor in deciding whether the failure to publish a proposed section 106 agreement has caused that person prejudice. It may indicate, depending on the facts, that the person is not someone who was interested in the agreement and would have commented on the section 106 agreement. That is not this case where the other material does indicate that Greenfields was interested in the section 106 agreement, was checking the Council's website to see if a copy was available, and where the overwhelming likelihood is that they would have commented on it.

70. In the circumstances, therefore, I do consider that the failure by the Council to place a copy of the proposed, or finalised, section 106 agreement on the planning register prior to granting permission did result in the unlawfulness of the decision of 4 August 2023 issuing the planning permission.

Remedies

71. Dr Bowes submitted that the section 106 agreement, and the financial contribution for highways improvements would have been the same or not substantially different even if a proposed section 106 agreement had been published. He sought to do that by demonstrating that the contributions to be made by other developments for which planning permission had been granted (and excluding the Pennyfeathers development) would, with a contribution of £406,359 from the developer here, have yielded the £770,000 or so required for the highways work.

72. Section 31(2A) of the 1981 Act provides that a court must refuse a remedy on a claim for judicial review "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". The conduct complained of here is the failure to comply with article 40(3)(b). The outcome was the grant of planning permission 4 August 2023 subject to a section 106 agreement which included a requirement on the developer to make a financial contribution of £406, 359 towards highway improvement works at two junctions.

73. In relation to section 31(2A), the court is concerned with evaluating the significance of the error on the decision-making process. It is considering the decision that the public body has reached, and assessing the impact of the error on that decision in order to ascertain if it is highly likely that the outcome (the decision) would not have been substantially different even if the decision-maker had not made that error. It is not for the court to try and predict what the public authority might have done if it had not made the error. If the court cannot tell how the decision-maker would have approached matters, or what decision it would have reached, if it had not made the error in question, the requirements of section 31(2A) are unlikely to be satisfied.

74. The Court of Appeal considered section 31(2A) in *R (Plan B Earth) v Secretary of State for Transport (WWF-UK Intervening)* [2020] EWCA Civ 214, [2020] PTSR 1446 (the decision was overturned on appeal to the Supreme Court but these observations were not the subject of comment in the Supreme Court and remain an accurate and helpful description of the position). It said this:

> "272. The new statutory test modifies the *Simplex* test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant.
>
> 273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law. Furthermore, although there is undoubtedly a difference between the old *Simplex* test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in *R (Public and Commercial Services Union) v Minister for the Cabinet Office* [2018] ICR 269, para 89)."

75. In the present case, the evidence relied upon by Dr Bowes falls far short of the material capable of demonstrating that this court could be satisfied that the outcome would not have been substantially different. The evidence before this court demonstrates that there have been at least 3 figures put forward as representing the cost of the works necessary at the two junctions. The e-mail of 11 February 2022 gives as the costs of the highways improvements a figure of £1,359,700.77. The witness statement of Mr Long gives a slightly lower figure for the work at both junctions of £1,302,21.94, comprising £530,124.38 for the Great Preston Road/Smallbrook Lane Junction and £772,087.56 for the Westridge Cross Junction. The developer's own estimate, in 2021, for the work at both junctions, was in the region of £777,000.

76. It is simply not possible to determine whether or not Dr Bowes is correct and whether the Council would take the view that the total cost of the highway works would be £776,043 so that the full costs would be recovered by adding the £406,359

contribution from the developer, together with £301,224 from the developers of the Nicholson development and £68,460 from RTS development (and leaving out of account the earlier anticipated amount of £584,335 from the Pennyfeathers development which would not now be immediately forthcoming given that planning permission for that development had passed). That is to invite the court to take the decision on what is the appropriate financial contribution. That is not the role of the court, nor does the court have the evidence or the experience to carry out that exercise. Similarly, we do not accept Dr Bowes submission that the basis for the Council's decision was that the Pennyfeathers site was allocated in an emerging plan and, therefore, the Council proceeded on the basis that a development at that site would come forward and the Council could recover any additional cost for the highway works from Pennyfeathers at that stage. There is, frankly, no evidence (as opposed to submission or assertion by Dr Bowes) that that was the actual basis of the officer's decision-making process when fixing the financial contribution. Nor is it clear that requiring a contribution from Pennyfeathers at some stage in the future for works that had already been carried out would be lawful. Nor do I consider that the matter is academic, as contended by the Council in its respondent's notice.

77. The judge, in fact, refused permission to apply for judicial review on this ground relying on section 31(3C) of the 1981 Act which is in materially similar terms to section 31(2A) and provides that a court must refuse to grant permission where "it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different" if the conduct complained of had not occurred. For the reasons given in relation to section 31(2A) above, the judge was wrong to refuse permission to apply for judicial review on this ground. He ought to have granted permission and, for the reasons given above, the court should not refuse a remedy in relation to ground 1 of the appeal. The court cannot be satisfied that it is highly likely that the outcome would not be substantially different. The financial contribution required might be different if the section 106 agreement had been placed on the planning register and members of the public had been able to comment on its terms. No other principle justifies the refusal of a remedy as a matter of the court's discretion in respect of ground 1.

Conclusion on Ground 1

78. I would allow the appeal on ground 1. The failure to comply with the obligation in article 40(3)(b) of the Order to place a copy of the proposed section 106 agreement, an agreement entered into, on the planning register rendered the decision of 4 August 2023 invalid.

THE THIRD ISSUE - GROUND 2 AND FAILURE TO CONSIDER MATERIAL CONSIDERATIONS

Submissions

79. Mr Streeten submitted that the judge was wrong to conclude that the planning committee failed to have regard to two material considerations at its meeting on 25 April 2023. The first was that the outline planning permission for the Pennyfeathers development had lapsed. The second was that the planning committee were not informed that there had been no progress on the review of highway works necessitated by developments within the area. He submitted that the judge was wrong

in fact when he took the view that even though the Pennyfeathers permission had lapsed, the Pennyfeathers site was an allocated site. It was not as there was an emerging plan in which it was proposed to allocate the Pennyfeathers site but that plan had not been approved.

80. Dr Bowes submitted that the considerations were not material and the judge was correct to regard the Pennyfeathers site as allocated as it was in the emerging plan.

Discussion

81. It is possible to take this ground of appeal shortly. The planning committee was considering whether to approve again the grant of an application for permission for a particular development. It did approve that application. The fact that planning permission for a different development had lapsed was not relevant to the decision that the planning committee was considering. The relevance, if any, of the Pennyfeathers development, on the facts of this case based on the evidence before us, would be as to the amount of the financial contribution required to carry out the necessary highways improvements at the two junctions. That would be dealt with by the officers in the section 106 agreement not the planning committee.

82. The judge was correct in his analysis of the position on the absence of a review of the position on highways. As appears from the first officers' report, the concern was to co-ordinate highway works necessary for the various developments where planning permission had been granted or sought. The aim was to provide a coherent scheme of work. The grant of planning permission in this case was not dependent on establishing such a scheme. The application had provided for a scheme of works to mitigate the impact on the junctions. The question for the planning committee was whether it wished to approve that application. The co-ordination of the carrying out of planning works could be done in a variety of ways and did not require a review to be available for the planning committee.

83. For those reasons, the judge was correct to refuse permission to apply for judicial review on this ground. I would have done so on the basis that the ground was not arguable, rather than by reference to section 31(3C) of the 1981 Act. Even if permission were granted, this ground of claim would have been dismissed.

84. In those circumstances, it is not necessary to consider the points in the respondent's notice as to whether this ground is academic or whether the judge could have found that there was no error for other reasons.

THE FOURTH ISSUE – GROUND 3 AND THE APPEARANCE OF BIAS

85. Mr Streeten submitted that the judge was wrong to dismiss this ground of claim. He submitted that the judge adopted the wrong approach as he focussed on apparent bias arising from a pecuniary or personal interest. Further, he submitted that the judge's conclusion that the conduct of Councillor Brodie did not give rise to an appearance of bias which vitiated the 27 July 2021 resolution was rationally insupportable.

86. Dr Bowes submitted that the judge was right for the reasons he gave.

Discussion

87. The law on appearance of bias is well-established and agreed by the parties. For present purposes, the appropriate test is that set out in ***Porter v Magill*** [2001] UKHL 67, [2002] 2 AC 357 especially at paragraph 103. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the councillor here was biased.

88. The submission that the judge adopted the wrong approach is simply untenable. The judge correctly summarised the law at paragraph 68 of his judgment (as Mr Streeten accepted). At paragraph 69, the judge said that the classic case of apparent bias was a pecuniary or personal interest but that "is not what is suggested here". As he said "what is relied upon is what occurred in the run up and during the July 2021 meeting". The judge then went on to analyse that conduct.

89. Secondly, the judgment of the judge, far from being, as it was put, "rationally insupportable" is correct. The conduct principally relied upon is that of Councillor Brodie towards Councillor Churchman. The context in which that occurred is as follows. This was a meeting of the planning committee. The question was whether a councillor should have the opportunity to address that meeting. Under the Council's constitution, Councillor Churchman did not have an automatic right to address the meeting as she was not a member of the planning committee and the site of the proposed development was not in her ward. She needed the consent of the chairman to address the meeting. The rules provide that the chairman would usually allow such a councillor to speak "where that councillor has a contribution to make which relates to material planning considerations" and where "it is not practical for the contribution to be made in writing via officers… and no other member of the Planning Committee can, or will, make the contribution".

90. Councillor Brodie in his witness statement states that he tried to clarify with Councillor Churchman what her contribution would be. As he says, she indicated that she would be speaking against the proposed development but failed to identify any material considerations which were not ones which would otherwise not be put to the committee. That is a clear demonstration that Councillor Brodie was seeking to apply the rules and ensure that all the material considerations were before the planning committee and, if Councillor Churchman was not putting forward a material consideration which would not otherwise be brought to the attention of the planning committee, she would not be able to speak. That does not begin to amount to conduct given rise to an appearance of bias on the part of the councillor.

91. Councillor Churchman in her message (and her witness statement) said that Councillor Brodie told her she could not speak unless she could support the motion. Mr Streeten invites us to infer from that that Councillor Brodie was ensuring that only those people supporting the motion would be heard and that gave rise to the appearance of bias. But the rest of Councillor Churchman's message needs to be read. She said Councillor Brodie said that "there were plenty of people to speak against it". That is, frankly, more consistent with the position being that set out in the Council's rules, namely that a councillor would not have the opportunity to address the planning committee meeting unless he or she was making a contribution which would not otherwise be brought to the attention of the planning committee. Whether one reads the evidence of Councillor Brodie or of Councillor Churchman, the judge was correct to conclude that the conduct complained of does not give rise to the appearance of bias.

92. The rest of the matters relied upon by Mr Streeten were, he submitted, context. On analysis, they would only be capable of supporting a finding of the appearance of bias if one had already concluded that the exchange between Councillors Brodie and Churchman were evidence of bias and were seeking confirmation of that view. The conduct complained of, whether analysed individually or cumulatively, does not give rise to an appearance of bias for the reasons given by the judge.

93. For those reasons, I would dismiss ground 3.

THE FIFTH ISSUE – GROUND 4 AND THE EXCLUSION OF COUNCILLOR PRICE FROM THE JULY 2021 MEETING

94. Mr Streeten submitted that the judge was right to conclude that the decision of Councillor Brodie to exclude amounted to a procedural irregularity that might affect the validity of the resolution of 27 July 2021. He submitted that the judge erred in concluding that the matter was academic as the planning committee was advised that the resolution of 27 July 2021 was a material consideration when considering the matter again at the meeting on 25 April 2023. He submitted that that tainted the vote at the later meeting as the planning committee might have voted differently if they had been aware of the earlier irregularity.

95. Dr Bowes also submitted that the judge was wrong to find a procedural irregularity but, if there were one, he was right to regard the matter as academic.

Discussion

96. It is relevant to consider the nature of the error that is alleged to have affected the validity of the 27 July 2021 resolution. It is not the case that the planning committee made some substantive error when they resolved to grant planning permission on that date. They had regard to material considerations and did not take into account irrelevant ones. Their decision to grant planning permission, subject to a section 106 agreement, was not irrational in planning terms. The reason the resolution is said to have been potentially flawed was that Councillor Price was unlawfully excluded from attending the 27 July 2021 meeting and could not vote on the resolution.

97. At the meeting on the 25 April 2023, the planning committee was advised that the officers did not consider that there had been any material change in circumstances (save for one matter irrelevant to this appeal). The resolution to grant planning permission was, therefore, a material consideration if they chose to consider the application for planning permission again. The planning committee did so. Councillor Price attended. He told the planning committee that he would have voted against the proposed development in 2021 and the outcome then would have been different. He said, however, circumstances had now changed. The relevant land was no longer being farmed. There had been a large reduction in the number of rental properties available (the implication being that the development was now needed). Councillor Price voted for approval of the application for planning permission.

98. The judge was right, therefore, to conclude that criticisms of the procedure at the July 2021 meeting "have been overtaken by events". The fact is that the error, if there were one, in July 2021 was in excluding Councillor Price from that meeting. He was present at the meeting in April 2023. He explained what would have happened if he

had been present in July 2021 and why he was voting in favour of approving the planning application in April 2023. The previous resolution was a material consideration for the planning committee to take into account. Any procedural error in relation to Councillor Price's exclusion from the July 2021 meeting was, therefore, academic and did not affect the validity of the April 2023 resolution. The judge was correct to dismiss this ground of the claim. I would not allow the appeal on ground 4.

99. In relation to the respondent's notice, the point as developed orally by Dr Bowes at the hearing was that a relevant rule in the Council's constitution (although not expressed as such) was on analysis a standing order made pursuant to paragraph 42 of Schedule 12 to the Local Government Act 1972. He submitted that that rule did exclude a councillor from participating in consideration of a planning application if he or she had not attended the site visit. He submitted that it was a matter for the chairman of the committee to decide whether a councillor should be excluded because he or she had failed to attend a substantial part of a site visit, either under the terms of other provisions of the Council's constitution or the common law.

100. This is a potentially important point dealing with the powers of local authorities and the responsibilities of chairs of committees. It is not necessary, and would be unwise, to decide the point in this case. It is not necessary as this ground of appeal, ground 4, fails for the reason given above. It would not be wise to decide it given the manner in which the point was advanced. We were not presented with copies of the legislation or all the relevant case law. We were presented with some extracts of the Council's constitution on the second day of the hearing and some were sent after the hearing had concluded. It would be unwise to decide a potentially important point in the absence of full and considered argument.

CONCLUSION

101. I would allow the appeal on ground 1. The Council failed to comply with its obligation under article 40(3)(b) to place a copy of the proposed or finalised section 106 agreement on the planning register prior to issuing planning permission on 4 August 2023. I would not allow the appeal on grounds 2, 3 or 4. In my provisional view, the consequences of allowing the appeal on ground 1 only is that the decision of 4 August 2023 issuing planning permission is unlawful and should be quashed. That would enable the Council to comply with its obligation, place the section 106 on the planning register and allow comment on the agreement and, in particular, the financial contribution for highway improvements. The validity of the resolution of 25 April 2023 approving the grant of planning permission is not, however, affected by the failure to comply with article 40(3)(b). It may be that parties would wish to make short written submissions on the appropriate order.

LORD JUSTICE SINGH

102. I agree with Lewis LJ but would like to add a few words of my own about the duty of candour and cooperation which falls upon public authorities which are defendants to judicial review proceedings. The principles, which are well-established and go back at least to the decision of the Court of Appeal in *R v Lancashire County Council, ex parte Huddlestone* [1986] 2 All ER 941, were summarised by the Divisional Court in *R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), at paragraphs 13-23, which was approved by this Court in *R*

(Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812; [2018] 4 WLR 123, at paragraph 106.

103. The essential point is encapsulated in the following sentence in paragraph 106(3) of *Citizens UK*:

> "The duty of candour and cooperation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide."

104. In the present appeal one of the submissions for the respondent has been that, even if there was a breach of the law because the respondent failed to publish a proposed section 106 agreement before the grant of planning permission, it is highly likely that the outcome would have been the same: see the respondent's skeleton argument for this appeal, at paragraph 24.

105. If that proposition was to be made good, it was incumbent upon the respondent to give a full and clear explanation of how certain figures which have been relied upon were arrived at. That explanation cannot be found in the witness statements filed on behalf of the Respondent. Instead, at the hearing before this Court, counsel appearing for the respondent took us to a number of different documents, to be found in different places, for example an email dated 11 February 2022 which was exhibited to David Long's witness statement. We were also taken to particular passages in what are otherwise long and detailed reports about a variety of subject matters: see paragraphs 75-76 in the judgment of Lewis LJ. This approach is to be deprecated in judicial review proceedings.

106. The Court should (in proper evidence, i.e. in a witness statement) be given a full, accurate and clear explanation of the decision-making process used by the public authority concerned and should not have to depend upon submissions by advocates nor should it have to piece together a number of different documents in order to understand what happened.